Supreme Court, U.S.
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No. 94-934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WALTER F. LISEK,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Congress intended the Federal Safety Appliance Act (FSAA) to mandate only the use of certain equipment and not to prohibit any procedure that involves going between railroad cars.

II. Whether the *Affolder* exception to absolute liability under the FSAA applies to misaligned drawbars as well as unopened coupler knuckles; whether a "properly set" coupler includes aligned drawbars.

III. Whether a failed coupling attempt is necessary for a violation of the FSAA.

IV. Whether the District Court properly granted summary judgment.

V. Whether the District Court properly struck Lisek's Affidavit.

PARTIES TO THE PROCEEDING

Plaintiff/Petitioner:

Walter F. Lisek (Lisek) is an individual and on the date in question was employed by Respondent, The Norfolk and Western Railway Company.

Defendant/Respondent:

The Norfolk and Western Railway Company (NW) is a corporation incorporated under the laws of the State of Virginia. NW is a wholly-owned subsidiary of Norfolk Southern Railway Company, which is a wholly-owned subsidiary of Norfolk Southern Corporation.

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OPINIONS BELOW

This case was brought in the Northern District of Illinois pursuant to the Federal Safety Appliance Act (FSAA), 45 U.S.C. §§2-43a, and the Federal Employers Liability Act (FELA), 45 U.S.C. §§51-60. On June 28, 1993, the Norfolk and Western Railway Company's (NW) motion for summary judgment was granted. *Lisek v. Norfolk & Western Ry. Co.*, No. 90-C6331, 1993 WL 243158, (N.D. Ill., Jan. 29, 1993). Lisek appealed to the Seventh Circuit Court of Appeals under 28 U.S.C. §1291. The Northern District of Illinois' opinion is reproduced in the Appendix to Lisek's Petition for Writ of Certiorari. In his Petition, Lisek has requested review of the District Court's order striking his affidavit. A copy of the transcript of the court's oral order is reprinted in the Appendix to this Brief at A-1.

The Seventh Circuit Court of Appeals unanimously affirmed the judgment by opinion dated July 14, 1994. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823 (7th Cir. 1994). The Seventh Circuit's opinion is reproduced in the Appendix to Lisek's Petition for Writ of Certiorari.

STATUTES INVOLVED

The statutes involved are the Federal Safety Appliance Act (FSAA), 45 U.S.C. §§2-43a, and the Federal Employer Liability Act (FELA), 45 U.S.C. §§51-60.

STATEMENT OF THE CASE[1]

Walter F. Lisek was employed by NW as a switchman in NW's Calumet railroad yard located in Chicago, Illinois. The duties of a switchman include "making-up" trains by linking together otherwise separated railroad cars. The process of linking railroad cars together is accomplished by "coupling" the cars by means of coupling mechanisms located at each end of the car. The coupling mechanism consists of a drawbar and a knuckle that connects with its mate on the adjacent car. The drawbar rests on a pivot which provides for lateral movement so that the cars will not derail while rounding curves. Depending upon the type and size of railcar, normal lateral play of a drawbar varies. The car on which Lisek claims he was injured was a "piggyback car", a flat car which is longer than standard boxcars. Such cars require drawbars having one and one-half feet of lateral play.

Although coupling occurs "automatically" upon impact between two cars, in order to accomplish successful coupling, at least one of the knuckles must be open and the drawbars must be aligned. Non-defective coupling mechanisms can, through the normal course of railyard activities and operations, become misaligned to an extent that they will not couple without preliminary realignment. The Seventh Circuit noted that Lisek did not dispute the fact that drawbars can become misaligned to the point of impeding coupling during the normal course of operations and that this does not reflect

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[1]The Statement of the Case is based on the parties' statement of undisputed facts which was filed before the District Court, the District Court's findings and the findings of the Seventh Circuit.

any defect in the drawbars. As such, prior to any coupling attempt, it is the normal and customary duty of the switchman to check the position of the couplers and align drawbars and open knuckles when necessary. This normally occurs prior to any attempted coupling or movement of the railroad cars. Because there is no automated means of centering misaligned drawbars, this task is commonly performed manually by a switchman. Although, as Lisek contended, there is experimental equipment available for this purpose, it is not widely available and not in common use in the rail industry[2].

On August 5, 1989, Lisek's crew was assigned to couple the cars located on Track No. 18 in the Calumet yard. Lisek walked between Track Nos. 18 and 19, simultaneously checking the coupling devices on the cars of both tracks, although his assignment was directed only to those cars on Track No. 18. The cars had not been moved and no coupling attempt had been made. While performing the pre-coupling inspection, Lisek noticed that a drawbar on a car located on Track No. 19 needed to be centered and he went to straighten it. A drawbar is a heavy item and occasionally cannot be moved by hand. In these circumstances, a "club" may be used to provide additional leverage or members of the

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[2]Other courts have noted the lack of such devices. *See e.g. Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 130 (3rd Cir. 1991); *United Transp. Union v. Lewis*, 711 F.2d 233, 235 n.5 (D.C. Cir. 1983). **The Safety Appliance Act does not require automated means of centering drawbars.**

railroad car department are called in to assist[3]. If the rail cars are close together and minute adjustments need to be made, a strap may be used.[4] Under the circumstances, it was determined that neither tools nor assistance was required to move the drawbar.

It is customary procedure for a switchman to determine how much force is required to move a drawbar by giving it a small push before attempting to center it. Lisek did not do so in order to save time. In preparing to move "a couple thousand pounds worth of steel, . . . an inch at a time", Lisek gripped the drawbar from below with his hands near his waist. He placed his left foot on a tie inside the rail and his right foot outside of the rail. Lisek stated that because he knew the drawbar was heavy he "just went in there and attacked it". When Lisek began to push the drawbar, it moved with unexpected ease, and because of this, Lisek lost his grip and his feet slipped out from under him. His left knee hit the ground. Lisek testified that, after his fall, he noticed "a wet foreign substance" on the tie, which he believed to be grease. No other evidence or testimony corroborated Lisek's testimony.

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[3]Lisek admitted that the drawbar moved with greater ease than he expected. As such, both the District Court and the Seventh Circuit found that a tool to help Lisek move the drawbar was not necessary. Specifically, the Seventh Circuit stated "It is unclear how that fact [use of a tool to move a resistent drawbar] is at all relevant to the issue of negligence. In any event, this problem clearly was not involved in Lisek's accident, as, if anything, he was thrown off by the ease with which the drawbar moved."

[4]Lisek admitted that because the cars were too far apart a strap was not necessary.

The three NW employees who inspected the area where Lisek claims he was injured, noted no oil or grease on the tie anywhere near where Lisek claims he was injured. Although grease or oil was noticed on Lisek's pant leg, no oil or grease was found on the sole of his shoe. Lisek was unsure of whether the fall was caused by the unexpected ease with which the drawbar moved, grease on the tie, or the two factors in combination. There were no allegations or findings that the drawbar was in any way defective. A coupling attempt was not made, either prior to or after Lisek's injury.

NW moved the District Court for summary judgment on both of Lisek's claims. In accordance with Northern District of Illinois' General Rule 12(m), NW filed a statement of facts in connection with its motion. All facts contained in the movant's 12(m) statement and not controverted in the opponent's 12(n) statement are deemed admitted. The opponent's 12(n) statement must also set out any additional facts which he believes create a factual issue. Lisek filed his 12(n) statement, a memorandum of law and a document entitled "Plaintiff's Response to Defendant's Motion for Summary Judgment on Counts I and II"[5]. Attached to this "response" was Lisek's five paragraph affidavit. NW moved

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[5]This document consisted of 15 numbered paragraphs containing various assertions and arguments and cited to exhibits, an affidavit and case law. There is no provision in the Federal Rules of Civil Procedure or United States District Court for the Northern District of Illinois General Rules for such a document. Nevertheless, the Seventh Circuit considered this document and held that it created no factual dispute.

to strike paragraphs three and four of this affidavit[6]. The court heard NW's motion on June 17, 1993 and ordered Lisek's affidavit stricken on the basis that it was hypothetical and conclusory. The court further noted that it had Lisek's deposition and would rely on it.

The District Court granted NW's motion for summary judgment on Lisek's FELA claim on the bases that Lisek "failed to raise any facts that would support a finding of negligence on the part of NW", and that Lisek was the sole proximate cause of his injuries. The court granted NW's motion on Lisek's FSAA claim on the bases that: the FSAA is an "equipment" statute requiring only that rail cars have automatic coupling devices and that Section 2 was not intended to prohibit workers from stepping between cars; a "plaintiff cannot establish a violation of Section 2 without proving that equipment failed to perform as prescribed on the day in question"; "Lisek failed to present any evidence that would support the inference that the drawbar . . . was

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[6]Paragraphs three and four read as follows:

> 3. In my experience as a switchman, I have observed that if a freight car is cut-off, or switched, into a track the car will continue rolling until it meets some obstruction (like another car) large or strong enough to stop its movement.
>
> 4. If a car is switched onto a track which contains another car or other cars, the former car should automatically couple with the latter car or cars.

defective"; and there was no evidence of a failed coupling attempt.

Lisek appealed to the Seventh Circuit Court of Appeals. Lisek based his appeal on several theories, including: 1) that Section 2 of the FSAA prohibits workers from going between railcars for any reason; 2) that evidence of a misaligned drawbar is sufficient to find a violation of the FSAA; 3) that misalignment of the drawbar and the presence of oil was negligence on the part of NW; and 4) that the District Court improperly struck Lisek's affidavit.

By opinion dated July 14, 1994, the Seventh Circuit unanimously rejected all of Lisek's arguments. The Seventh Circuit stated that the purpose of Section 2 of the FSAA is to require the use of automatic coupling equipment, and a railroad is not liable when it utilizes equipment that complies with the statutory mandate and is not defective. Relying on *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509 (1950), the Seventh Circuit held that the *Affolder* exception[7] to the railroad's absolute duty[8] to provide equipment which couples automatically also applies to a non-defective drawbar which becomes misaligned as a normal

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[7] *Affolder* allowed an exception to liability for failure to couple on the basis of a non-defective closed knuckle.

[8] Although the Seventh Circuit speaks of the *Affolder* exception to "the railroad's absolute liability" for failure to couple, neither the *Affolder* opinion, nor any other Supreme Court opinion, has ever imposed absolute liability on the railroad. Rather, the Supreme Court has recognized that the FSAA places an absolute duty upon the railroad to provide equipment which operates as mandated. "[T]he duty under the Acts . . . is an absolute one . . . ." *Affolder*, 339 U.S. at 98, 70 S.Ct. at 510.

part of operations. As such, the Court held that a non-defective misaligned drawbar cannot trigger a violation of the railroad's absolute duty in the same way that a failure to couple would and, in the absence of proof of a failed coupling attempt, affirmed the grant of summary judgment on Lisek's FSAA claim.

The Seventh Circuit also affirmed the District Court's entry of judgment on Lisek's FELA claim. After a *de novo* review of NW's Motion, Lisek's response to the Motion, Lisek's 12(n) statement of facts, his memorandum of law, his document entitled "Response," the uncontroverted facts contained within NW's 12(m) statement, and Lisek's stricken affidavit, the Seventh Circuit held that Lisek failed to offer even a "scintilla" of evidence of NW's negligence. The Seventh Circuit declined to consider the propriety of the District Court's decision to strike Lisek's affidavit on the basis that "nothing in that affidavit would have changed either the District Court's or our own analysis". Finally, the Court held that Lisek waived arguments that grease he claimed he saw on the tie after his fall may have involved negligence and may have been partially responsible for his fall since he raised those arguments for the first time on appeal.[9]

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[9]"Any facts or argument not offered to the district court when it decided the motion, however, are of course waived." *Lisek*, 30 F.3d at 834 (*citing In re Weber*, 25 F.3d 413, 415-16 (7th Cir. 1994)). In any event, the District found that the "presence of oil on the rail is not, however, supported by anything other than Lisek's own testimony" and "even if there was grease on the tie, there is no evidence that NW knew or should of known" it was there, no evidence of how long it had been there or where it came from, and no evidence that sufficient time had elapsed for NW to discover and correct the situation.

Lisek bases the instant appeal on the same three theories he presented to the Seventh Circuit. The principal theory is that the FSAA places an absolute prohibition on men going between cars. In making this argument, Lisek asks this Court to disregard the plain language of the Act, its Legislative History and the modern trend of case law of the federal circuits to the contrary. The second theory is that the District Court's opinion and ruling "shows a fundamental lack of understanding of a basic concept under the Federal Employers Liability Act" in that "the railroad has a nondelegable duty to provide a safe place to work". This theory of Lisek's confuses the legal theories of "contributory negligence" in which the worker's own negligent conduct, careless acts or omissions is the ***sole proximate cause*** of his injuries, a valid defense to FELA and FSAA negligence claims, with "assumption of the risk", which is not. Under this argument, Lisek also continues his attempt to bolster his negligence claim with argument and "facts" which were not presented to the District Court. The third theory is that the District Court erred in striking Lisek's affidavit. This theory seems to argue that neither court below considered the contents of the affidavit and, if they had, somehow the outcome of the case would be different. This is false. Both lower courts considered the statements of the affidavit and determined that the affidavit added nothing to Lisek's claim.

REASONS FOR DENYING THE WRIT

The petition fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The courts below properly adhered to both the

letter and spirit of the FELA and the FSAA and fully considered and correctly decided the issues.

The decision of the Seventh Circuit was based on a proper reading and interpretation of *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509 (1950), the plain language of the FSAA, and the legislative history of the Act. The Seventh Circuit's decision does not create a split of authority between the Circuits. The Seventh Circuit's decision follows an unbroken line of federal authority since the District of Columbia Circuit's decision in *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983).

Lisek's summary judgment argument contains only questions of evidence and factual findings and raises issues deemed waived by the Seventh Circuit. Lisek's stricken affidavit does not raise issues of such importance as to warrant exercise of this Court's jurisdiction. Review by this Court is not required. Lisek's petition should be denied.

I.

THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THE MODERN TREND OF THE FEDERAL CIRCUITS, AND WAS BASED ON THE PLAIN LANGUAGE OF THE FSAA, ITS LEGISLATIVE HISTORY, AND THIS COURT'S DECISION IN *AFFOLDER*

Lisek argues that the Seventh Circuit decision "is at odds with those rendered by other federal courts of appeal, as well as state supreme and appellate courts." This is not an accurate statement. The line of federal authority in the past

two decades is virtually unbroken and reflects a modern trend of the federal circuits since the District of Columbia Circuit's decision in *Lewis*. The federal circuit cases upon which Lisek relies are *Geraghty v. Lehigh Valley R. Co.*, 70 F.2d 300 (2d Cir. 1934); *Hampton v. Des Moines & Cent. I. R. Co.*, 65 F.2d 899 (8th Cir. 1933); *Chicago, St. P., M. and O. Ry. Co. v. Muldowney*, 130 F.2d 971 (8th Cir. 1942), *cert. denied* 317 U.S. 700, 63 S.Ct. 526 (1943); *Kansas City Southern Ry. Co. v. Cagle*, 229 F.2d 12 (10th Cir. 1955), *cert. denied* 351 U.S. 908, 76 S.Ct. 697 (1956); *Metcalfe v. Atchison, Topeka & Santa Fe Ry Co.*, 491 F.2d 892 (10th Cir. 1974); and *Clark v. Kentucky & Indiana Term. R.R.*, 728 F.2d 307 (6th Cir. 1984). *Geraghty* and *Hampton* were decided over sixty years ago and *Muldowney* over fifty years ago; all prior to this Court's decision in *Affolder*.[10] All of these cases, except *Clark*,[11] were decided before the District of Columbia Circuit's decision in *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983). There are no recent cases from the Second, Eighth and Tenth Circuits on the issue of the scope of Section 2 of the FSAA.

Of the seven state supreme court cases cited by Lisek, three are out of federal circuits with 1994 federal court decisions which follow the modern trend. Of the other four cases, two are from states in the Eighth Circuit and two are

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[10]In all of these cases there was evidence that the coupling device was defective. *Metcalfe* was decided without any reference whatsoever to this Court's decision in *Affolder*.

[11]*Clark* has since been clarified and limited by the Sixth Circuit's recent opinion in *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994).

from states in the Tenth Circuit. These decisions rely on case law which predates the *Lewis* decision. These decisions were based on an overly simplistic view of the purpose of the FSAA which was brought to light by the *Lewis* court and corrected and clarified thereby.

The Seventh Circuit herein was guided by the *Lewis* court's thorough examination of the Legislative History of the FSAA and the plain language of the Act, as well as this Court's decision in *Affolder*.

A. The *Lewis* Decision: The FSAA Is An Equipment Statute And Does Not Impose An Independent Prohibition Against Men Going Between Cars

Lisek's petition wholly fails to recognize that the federal circuits have consistently interpreted Section 2 of the FSAA ever since the District of Columbia Circuit's extensively researched and well reasoned opinion in *Lewis*. In *Lewis*, the question before the court was whether Section 2 of the Act was violated only when the railroad fails to provide properly functioning automatic couplers, but is not violated when an employee is required to go between cars or to place a material portion of his body between cars. 711 F.2d at 242. Fundamentally, the issue was whether the Act was an "equipment" statute or whether it intended a wholesale prohibition of men going between cars for any reason. In addition to reviewing this Court's prior decisions, as well as those of other circuits, the court underwent an extensive analysis of the plain language and the legislative history of

the Act; ***something none of the cases relied on by Lisek had done.***

First enacted in 1893, Section 2 of the FSAA was designed to alleviate the risks associated with the manual coupling of railroad cars which had required workers to stand between railroad cars as they moved together, sometimes at speeds up to 12 miles per hour. The manual act of coupling two railroad cars while they were moving was found to be so dangerous as to mandate compatible automatic coupling equipment so that a worker would not have to stand between railroad cars as they moved together. *Id.* at 247.

The *Lewis* court held that the plain language of Section 2, namely the prohibition against cars "not equipped with couplers coupling on impact, and which can be uncoupled without the necessity of men going between the ends of cars", only refers to the "kinds of couplers with which cars and locomotives shall be equipped", and that it can not be concluded therefrom that Congress also "intended a blanket prohibition against going between cars". *Id.* at 245, 248[12].

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[12]The D.C. Circuit stated that the concluding phrase requiring couplers that couple and uncouple automatically without the need to go between cars describes the operating features of the equipment in two respects: 1) couplers must be so constructed that cars can be uncoupled without going between cars; and 2) couplers must be constructed so that coupling can take place without men between cars ***during the coupling procedure***. The court stated that this conclusion is strengthened when read in context with the rest of the Act. For example the title of the Act states:

> An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce *to equip* their cars with

After reviewing the legislative history, the court stated:

> The prevailing coupling system in use in 1892 was the link-and-pin coupler, which required a brakeman to stand *entirely* between the rails to couple and uncouple cars. . . . The grave risk of death or injury from such an operation is self-evident. Moreover, such "automatic" couplers as were then in use did little to reduce that risk. Some still had to be coupled manually from a position entirely between the cars.
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> * * * *
>
> To reduce such risks, Congress determined to mandate the provision of couplers that can be coupled and uncoupled from outside the cars, and which are fully compatible with one another. Given this focus on equipment, it is not surprising that [there] is nothing in the legislative history which might demonstrate that Congress also intended to regulate

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automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Id. at 244 (*quoting* Act of March 2, 1893, ch. 196, section 2, 27 Stat. 531) (emphasis supplied).

Moreover, the Court noted that Congress could not have possibly intended a wholesale prohibition of going between cars because the FSAA itself required that cars be equipped with air brakes whose very function depended on workmen going between the cars [and the rails] to couple the hoses for the air brakes. *Id.* at 245.

> operating procedures or to make it unlawful for men to go between cars.

Id. at 246-47 (*citing* H.R.Rep. No 1678, 52d Cong., 1st Sess. 3, 5-6 (1892)).

The *Lewis* court concluded that the plain language of the Act and its legislative history had only one logical and consistent interpretation; the scope of Section 2 is "confined to the requirement that railroad cars be 'equipped' with automatic couplers that can be operated without the necessity of men going between the ends of the cars, and we conclude that the statute does not separately prohibit the act of going between cars". *Id.* at 251. The court further found "that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is 'defective'." *Id.* at 235 n. 5.

With regard to the issue of failure to provide automatic means of drawbar alignment, the court stated that the Congress of 1893 could not have meant to require equipment which is still not available 90 years later stating:

> We shrink from accepting a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2--and have done so for the entire 90 years the Act has been in effect.

Id. at 251 n. 39.

Since *Lewis*, five circuit courts of appeal, namely the Third, Fourth, Fifth, Sixth, and Seventh Circuits, and a District Court out of the Ninth Circuit have followed *Lewis* and interpreted Section 2 of the FSAA in a consistent manner.[13] This line of federal authority is unbroken. All of these decisions were issued in the past twelve years, four in 1994 alone. It is clear that since the D.C. Circuit in *Lewis* clarified Section 2, the modern trend of the Federal Circuits is correct and is not some aberration producing an irreconcilable conflict necessitating review by this Court. There are no decisions on this issue out of the 1st or 11th Circuits.

B. Other Decisions Of This Court

Lisek argues that the Seventh Circuit's opinion "subverts this Court's holding in *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384 (1949). This is wholly inaccurate. The Seventh Circuit's opinion is entirely consistent with the holding of *O'Donnell*. In *O'Donnell*, this Court stated that "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong . . . ". *Id.* at 390. No one disputes that this is still the law. The pertinent

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[13] *Kavorkian v. CSX Transp. Inc.* 33 F.3d 570 (6th Cir. 1994); *Goedel v. Norfolk & Western Ry. Co.*, 13 F.3d 807 (4th Cir. 1994); *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823 (7th Cir. 1994); *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3rd Cir. 1991); *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied* 480 U.S. 932, 107 S.Ct. 1571 (1987); *Towles v. Burlington Northern R.R. Co.*, No. CS-93-270-JBH, 1994 WL 151073 (E.D. Wash., Apr. 20, 1994). *See also Smith v. Aberdeen, Caroline and Western Ry. Co.*, 859 F.Supp. 188 (W.D. N.C. 1994).

language is "failure to perform as required". The Seventh Circuit very clearly based their decision on the fact that there was no attempt at coupling and, as such, no "failure to perform as required".

Lisek also argues that the Seventh Circuit ignored this Court's decisions in *San Antonio & A.P. Ry. Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626 (1916) and *Atlantic City R.R. Co. v. Parker*, 242 U.S. 56, 37 S.Ct. 69 (1916). *Wagner* is distinguishable on its facts ***because there was evidence of defective equipment***. Moreover, the Court stated, "[w]e need not in this case determine . . . that the failure of a coupler to work at any time sustains a charge that the Act has been violated". *Wagner*, 241 U.S. at 484, 36 S.Ct. at 629.

In *Parker*, the plaintiff was injured while straightening a misaligned drawbar. This Court acknowledged that "some play must be allowed to drawheads" and then went on to state:

> If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that ***in absence of any explanation believed by them,*** the failure indicated that the railroad had not fully complied with the law.

242 U.S. at 59, 37 S.Ct. at 70 (emphasis supplied). The critical phrase, "in the absence of any explanation believed by them" gave the railroad an opportunity to explain the

incident. *See Reed*, 939 F.2d at 131. Lisek's argument is fundamentally flawed in that it ignores the fact that railcars have vastly varying degrees of required lateral play for the successful rounding of curves. Lateral play "so great as to prevent coupling" is in certain circumstances a necessity and not the result of defective equipment. Moreover, Lisek continues to ignore the fact that the Seventh Circuit held that the "absence of a failed coupling attempt is significant because ***it is the failure to couple*** that triggers the railroad's absolute liability under section 2." *Lisek*, 30 F.3d at 529 (*citing Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 96, 98, 70 S.Ct. 509, 510 (1950)).

C. *Affolder* And The Modern Trend Of Federal Circuit Decisions

In *Affolder*, this Court acknowledged that a failure of equipment to perform as required is in itself an actionable wrong (relying on *O'Donnell*), but then stated:

> ***Of course this*** [the language in O'Donnell] ***assumes that the coupler was placed in a position to operate on impact.*** Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened", the railroad had a good defense.

339 U.S. at 99, 70 S.Ct. at 511 (emphasis supplied). *Affolder* clearly provides that liability under the FSAA is dependent upon a properly set coupling system, including aligned drawbars as well as open knuckles.

This issue was raised in *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764 (5th Cir. 1986). In that case, after a ***failed attempt at coupling*** between two cars, the plaintiff noticed that the drawbars on both cars were off-center. During his effort to realign one of the drawbars plaintiff was injured. Both parties agreed that the cars failed to couple because of drawbar misalignment before impact. The dispute centered on the legal significance of this. *Id.* at 768.

The Fifth Circuit stated that failure to couple on the occasion in question imposes absolute liability under Section 2 of the FSAA, but that "railroads may take comfort, however, in at least one clearly established defense". *Id.* at 767 (*citing Affolder*, 339 U.S. at 99, 70 S.Ct. at 511). The court went on to state that "[o]ur examination of the FSAA and its legislative history leads us to agree [with *Lewis*] that the FSAA is equipment oriented and 'does not address operating procedures'". *Id.* at 768 (*citing Lewis* 711 F.2d at 245. Accordingly, the court held that "because the FSAA is essentially an equipment safety statute, drawbar misalignment prior to impact" may support a defense if the "misalignment is due to some factor other than equipment failure or defect". *Id.* at 768 (The court upheld judgment for the employee because there was no evidence suggesting a cause or explanation for misalignment).

This issue was next addressed by a federal court in 1991 when the Third Circuit decided *Reed v. Philadelphia, Bethlehem and New England R.R. Co.*, 939 F.2d 128 (3rd Cir. 1991). In *Reed*, the plaintiff was injured, after a ***failed coupling attempt***, when he stepped between two cars to open closed knuckles on both cars. The court instructed the jury

to consider the railroad's defense that the cars failed to couple because the couplers were out of alignment. The jury found that the railroad had not violated the Safety Appliance Act.

On appeal, the Third Circuit agreed with the reasoning in *Maldonado* and *Lewis* that the rationale of *Affolder* applied to a defense of a misaligned, non-defective drawbar, as well as to a non-defective, closed knuckle. "In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act". *Id.* at 132 (The judgment was vacated and remanded due to the trial court's error in allowing defense counsel to refer to evidence that had been ruled inadmissible.). Lisek's reliance on the fact that on retrial Reed prevailed on the evidence in no way abrogates the Third Circuit's position.

The next federal circuit decision came out of the Fourth Circuit in *Goedel v. Norfolk & Western Ry. Co.*, 13 F.3d 807 (4th Cir. 1994), which Lisek fails to cite. In *Goedel*[14], the plaintiff was injured when, ***during a coupling attempt***, he stepped between two cars, one of which was moving toward the other, and kicked a misaligned coupler. His foot was

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[14]The plaintiff was employed by the Ohio River Company in the capacity of brakemen. He was injured while attempting to realign a drawbar on a Norfolk & Western rail car. He was not an employee of NW.

caught between the two coupling mechanisms. There was no failed coupling attempt. The district court held that plaintiff failed to present any evidence that the cars failed to couple due to a defective mechanism, and even if the mechanism was defective, the plaintiff was the sole proximate cause of his injuries by negligently putting his foot between the two couplers[15].

After an extensive analysis of the Act and earlier case law, the Fourth Circuit, in keeping with the modern trend of the federal circuits, stated that the Safety Appliance Act requires automatic coupling once the couplers are properly positioned to couple. In affirming the District Court's holding that the Act was not violated, the Fourth Circuit stated "[w]e believe the Safety Appliance Act was created to reduce the risks associated with coupling rail cars and not to require that drawbars be aligned perfectly at all times". *Id.* at 812. The court specifically rejected the Tenth Circuit's decision in *Metcalfe*, stating:

> [T]he coupling mechanisms, the knuckles and drawbars, are designed to move laterally so that the train can negotiate turns without derailing. This lateral play also allows rail cars to be coupled when the cars are located on a curved track. The necessity to keep the trains on the tracks and to allow cars to couple

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[15]Plaintiff had ignored specific training and instruction about not kicking couplers and to stop moving cars before attempting to realign couplers.

> on curved sections of track demands that drawbars have some lateral movement.
>
> * * *
>
> In the event of misalignment, the problem can be solved easily by stopping the rail cars when they are several feet apart and then properly aligning the coupling mechanisms so that they will couple automatically on impact.
>
> * * *
>
> ***Should this court find, as the Tenth Circuit has, that when two misaligned couplers, absent a defect, fail to couple is a violation of the Safety Appliance Act, we would ignore the practical requirement that drawbars move laterally so that trains may move smoothly without derailing.***

Id. at 812 (emphasis supplied).

The next case was the Seventh Circuit's decision herein. Shortly after the Seventh Circuit's decision, the Sixth Circuit decided *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994). Lisek's petition only passingly refers to this case despite the fact that in *Kavorkian* the Sixth Circuit clearly distinguished and limited its previous decision in *Clark v. Kentucky & Indiana Term. R.R.*, 728 F.2d 307 (6th Cir. 1984), upon which Lisek relies to support his argument that the circuits are split.

In *Kavorkian*, two cars ***failed to couple*** because neither drawbar was aligned. Kavorkian injured his back when he attempted to align one of the drawbars. Both cars were

stationary at the time. Despite pain in his back, Kavorkian aligned the drawbars and a successful coupling was made thereafter. A jury found in Kavorkian's favor. On appeal, the issue was whether a railroad may present evidence of drawbar misalignment as a defense to a suit under Section 2. The trial court declined to admit such evidence or evidence that the coupling mechanisms were not defective or in a bad condition. The Sixth Circuit noted that the trial court felt constrained to follow that Circuit's interpretation of the FSAA in *Clark*, although it disagreed with that interpretation. *Kavorkian*, 33 F.3d at 574.

On appeal, the Sixth Circuit distinguished and limited its prior opinion in *Clark* on the basis that in *Clark* 1) there had been sufficient evidence that the couplers were properly set; 2) the workers had inspected and realigned misaligned drawbars; and 3) one of the knuckles of the coupler in question was defective, suggesting that the defective knuckle, and not a misaligned coupler, was the cause of the failure to couple. *Id.* at 575. The court went on to say that a reading of *Clark* in a manner to limit the requirement of *Affolder* of properly set couplers to mean only that at least one knuckle is open, is an incorrect reading of that decision[16]. *Id.* at

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[16] "We first note that the language in *Clark* limiting the requirement of properly set couplers is *obiter dicta*, raised in a discussion of an alternative basis for imposing FSAA liability in that case. More important, the conclusion in *Clark* rested upon the fact of railroad workers going between cars to correct for what was perceived as defective equipment." *Id.* at 574-75. The court stated that it allowed the imposition of FSAA liability in *Clark* on the basis of moving a drawbar was "not merely because a worker went between the cars, but because the injury resulted when the worker went between the cars to *handle defective equipment*." *Id.* (emphasis in original).

574. The Sixth Circuit is clearly in line with the modern trend.

The court further stated that the problem with *Clark* was the assumption that a drawbar's lateral movement was "typically one to one and one-half inches 'on either side' and therefore reasoned that workers going between the cars to realign drawbars did so because of defective equipment, which the FSAA prohibits". *Id.* at 575. "[A]lthough workers must go between cars to realign even non-defective drawbars, the danger in doing so does not come from the situation against which the FSAA seeks to safeguard . . . . Thus, we read *Affolder's* requirement of 'properly set' to include properly aligned drawbars." *Id.* As such, the Sixth Circuit remanded the case to permit CSX to prove to the jury that the drawbars in question were non-defective and merely misaligned. *Id.* at 575-76.

Lisek's petition also failed to advise the Court of the decisions in *Towles v. Burlington Northern R.R. Co.*, No. CS-93--270-JBH, 1994 WL 151073 (E.D. Wash) (Ninth Circuit) and *Smith v. Aberdeen, Carolina & Western Ry. Co.*, 859 F.Supp. 188 (W.D. N.C. 1994) (Fourth Circuit), both of which held that a misaligned drawbar, which is not defective, is not a violation of Section 2 of the FSAA.

Lisek's statement that all of the federal circuits which have addressed the issue of a misaligned drawbar "have uniformly held that the misalignment alone was sufficient evidence for a jury to find a violation" of the Act is false and misleading. The Fourth, Fifth, Sixth and Seventh Circuits have held explicitly to the contrary in this situation. The Third and

District of Columbia Circuits recognize a defense of a non-defective misaligned drawbar to an alleged Section 2 violation. The decision from a district court located in the Ninth Circuit recognizes this defense. The First and Eleventh Circuits are silent on the issue[17]. The Second and Eighth Circuit decisions upon which Lisek relies were decided prior to this Court's decision in *Affolder* and long prior to the District of Columbia Circuit's analysis of the language and legislative history of Section 2. To the extent that these cases do not recognize the defense of a non-defective misaligned drawbar, they are limited by this Court's decision in *Affolder*.

The Tenth Circuit's decision in *Metcalfe*, the most recent federal case (1974) relied on by Lisek, does not mention *Affolder*. Although it is not clear from that opinion, it appears that the court determined that the drawbar was more out of alignment (to the "extreme east") than required by its natural 'play' and therefore was defective. *Metcalfe*, 491 F.2d at 897. Lisek presented no evidence that any part of the coupling device was defective. NW presented substantial evidence that the coupling device was not defective.

Finally, and most significantly, the Seventh Circuit expressly based its decision on the fact that no coupling attempt, failed or successful, was ever made. This was critical to both lower courts' decision in that a coupling attempt is required to trigger Section 2 of the Act in the first instance.

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[17]Research has not revealed any state decisions from these circuits on this issue.

The Seventh Circuit's decision is not at odds with the decisions of the other Federal Circuits as alleged by Lisek. All of the cases decided by federal courts since *Lewis* are consistent with each other. The state courts are obligated to follow federal court decisions under the Act. There is no basis for review by this Court of the Seventh Circuit's decision on this issue.

II.
SUMMARY JUDGMENT WAS PROPERLY GRANTED

The District Court properly granted summary judgment on Lisek's FELA claim. In its *de novo* review of NW's Motion, the Seventh Circuit fully considered and correctly decided the relevant issues. Both lower courts held that Lisek failed to present even a "scintilla" of evidence to establish that any negligence by NW contributed to cause his injury.

Lisek now raises arguments which the Seventh Circuit held waived due to his failure to preserve them at the district court level. In opposing NW's Motion for Summary Judgment, Lisek had an affirmative duty to raise all issues of fact which he believed supported denial of NW's Motion.[18] The

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[18]Lisek's obligation under the Federal Rules of Civil Procedure was to "set forth **specific facts** showing that there is a genuine issue for trial". *Fed. R. Civ. P. 56(e)*. Northern District of Illinois General Rule 12(n) requires that these facts be in a specified form, i.e. numbered paragraphs controverting any of the movant's statements and including any additional facts. Lisek's 12(n) statement contained only the following:

> 66 and 67. Lisek believes that his injury could have been caused by a combination of both the drawbar moving more easily than anticipated and grease or some

Seventh Circuit noted that Lisek's 12(n) statement "contains no factual assertions to support the inference that NW was in some way negligent or that its negligence somehow caused Lisek's accident." The Court stated that ordinarily, this flaw alone would suffice to support the grant of summary judgment in favor of NW on the FELA claim. However, the Court went on to consider allegations raised by Lisek in a document entitled "Plaintiff's Response to NW's Motion for Summary Judgment on Counts I and II" which consisted of fifteen numbered paragraphs making various assertions. The Court specifically considered numbered paragraphs 11 through 13 and determined that the statements in those paragraphs created no factual issue as to NW's negligence.

The Seventh Circuit also noted that Lisek attempted to expand his negligence theory on appeal as to the existence of oil or grease on the tie upon which he stood. The Court noted that Lisek's Response to NW's motion never mentioned oil or grease. His Memorandum of Law never mentioned oil or grease. His stricken affidavit never mentioned oil or grease. Noting that this argument was not made to the District Court, the Seventh Circuit correctly held that it was waived. *Lisek*, 30 F.3d at 834 (*citing In re Weber*, 25 F.3d 413, 415-16 (7th Cir. 1994)).[19]

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other foreign substance on the tie.

[19]The District Court reviewed all of the evidence on this issue and found that there was no evidence corroborative of Lisek's own self-serving statement that oil or grease on the tie may have contributed to his accident and may have been the result of NW's negligence.

Lisek argues that the Seventh Circuit decision is contrary to the FELA in that NW had a non-delegable duty to supply a safe place to work. While a correct statement of the law, it is irrelevant. The Seventh Circuit identified and correctly applied the appropriate burden of proof under the FELA.[20] Lisek has failed to present any basis for granting his petition.

Lisek's argument as to contributory negligence is confusing and misleading. The FELA contains a specific provision stating that although "contributory negligence shall not bar a recovery. . . the damages shall be diminished. . . in proportion to the amount of negligence attributable to such employee. . . " 45 U.S.C. §53. Despite Lisek's argument that the lower courts improperly applied the FELA and permitted the defense of an assumption of risk, these factual issues and questions of evidence were fully considered and correctly decided below. Essentially, the District Court found that NW was not negligent and that Lisek was the sole proximate cause of his accident. Lisek has confused the issue of assumption of the risk with that of contributory negligence. The District Court properly applied the standard for contributory negligence under §53 of the FELA.

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[20]The Seventh Circuit noted that despite a lightened burden for plaintiff under the FELA, "if the plaintiff presents no evidence whatsoever to support the inference of negligence, the railroad summary judgment motion is properly granted."

III.
THE DISTRICT COURT PROPERLY STRUCK LISEK'S AFFIDAVIT

Lisek's final argument suggests that his Petition should be granted because the lower courts failed to consider his affidavit filed in opposition to NW's motion for summary judgment. The District Court struck Lisek's affidavit only after considering the entire affidavit. The District Court held that with Lisek's entire deposition transcript available for review, the conclusory and hypothetical statements of the affidavit were unnecessary. Specifically, the affidavit failed to set forth any facts relevant to the specific circumstances of the incident in which Lisek was involved. The affidavit failed to identify any new evidence. The affidavit failed to confront the affirmative evidence presented in NW's motion for summary judgment. The affidavit was properly struck because it failed to create any genuine issue of material fact. *See Hadley v. County of DuPage*, 715 F.2d 1238, 1243 (7th Cir. 1983), *cert. denied* 465 U.S. 1006, 104 S.Ct. 1000 (1984).

Lisek failed to advise this Court that the Seventh Circuit reviewed the affidavit in its entirety and found no error by the District Court in striking Lisek's affidavit. The Seventh Circuit stated that its opinion was not changed by the contents of the affidavit because it failed to raise any issues of material fact in any event.

This issue is clearly not of the type routinely considered by this Court as warranting the exercise of its jurisdiction.

CONCLUSION

The Seventh Circuit's decision properly evaluated the District Court's grant of summary judgment and correctly applied the FSAA. The Seventh Circuit correctly followed *Affolder*. The *Lisek* opinion is in full accord with the modern trend of the federal courts which have interpreted Section 2 of the FSAA. Lisek has failed to present any other basis upon which this Court should grant the petition for writ of certiorari. Norfolk and Western Railway Company respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

Evan B. Karnes II
(Counsel of Record)
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December 22, 1994 *Attorneys for Respondent*

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WALTER LISEK,	)	
	)	
Plaintiff,	)	
vs.	)	No. 90 C 6331
	)	
NORFOLK & WESTERN	)	Chicago, Illinois
RAILWAY COMPANY,	)	June 17, 1993
	)	9:00 a.m.
Defendant.	)	

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE M. MAROVICH

For the Plaintiff:

Callis, Papa, Hale, Jensen, Jackstadt,
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Official Court Reporter:

Geraldine D. Monahan
219 South Dearborn Street
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Chicago, Illinois 60604
(312) 435-6890

THE CLERK: 90 C 6331, Walter Lisek v. Norfolk & Western Railway Company, defendant's motion to strike the affidavit of Walter Lisek.

THE COURT: Good morning.

MR. KARNES: Good morning, your Honor. Evan Karnes on behalf of the defendant, Norfolk & Western Railway Company.

MR. BAILEY: Good morning, your Honor. Steve Bailey on behalf of the plaintiff, Walter Lisek.

THE COURT: You guys had two parts to this motion, and I assume that one has been taken care of, namely, the summary judgment has been responded to; is that right?

MR. KARNES: Yes, your Honor. That's completely right.

THE COURT: Because we were having a little bit of a difficult time in getting that matter on file here. At least

our docket said it was filed and we didn't have a copy. I assume we now have it.

THE CLERK: Defendant provided us with a copy.

MR. KARNES: I believe plaintiff had complied with this, but it got lost up on 20.

THE COURT: That part of it is done and we have the matter of the affidavit.

MR. KARNES: We do.

THE COURT: And I'll tell you what I am going to do is strike it, and the reason why is because it's conclusory and hypothetical, and besides which, we do have his deposition, and I will use that instead.

Thank you for being here this morning, both.

MR. KARNES: Could I raise a matter not on the call just very, very briefly?

THE COURT: Fine.

MR. KARNES: Mr. Bailey's office has a number of attorneys. One of them will be either second or lead counsel

in this trial. He would like to be admitted to this trial bar. Mr. Jensen is a former prominent local prosecutor Down State. I am a member of the trial bar. He brought his application with him, and would you consider --

THE COURT: I certainly would admit him, since he comes so highly recommended.

MR. BAILEY: Thank you, your Honor.

THE COURT: Can you do battle against the two of them?

MR. KARNES: I don't know. Just a little railroad company.

THE COURT: I think you guys are in trouble.

MR. KARNES: Move the admission of Keith A. Jensen to the trial bar, your Honor. Mr. Jensen, I believe, brought the appropriate documents to be filed downstairs.

THE COURT: Fine. And I will approve it.

THE COURT: Do we need to swear him in or just his signature?

THE CLERK: No, just the signature.

THE COURT: Well, leave me have the paper and I will sign it.

Welcome to our court.

MR. KARNES: Does he also have to file a general application to the Northern District?

THE CLERK: I cannot deal with this petition until it's processed by the Clerk's office.

THE COURT: Bring it up and sign it.

MR. JENSEN: Thank you, your Honor.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case on June 17, 1993 at 9:00 a.m.

_____ _____Official
Court Reporter Date

Not Reported in F.Supp.
(Cite as: 1994 WL 151073 (E.D.Wash.))

Richard K. TOWLES, Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation, Defendant.

No. CS-93-270-JBH.

United States District Court, E.D. Washington.

April 20, 1994.

Daniel L. Kinerk, Kroschel & Gibson, Bellevue, WA, for plaintiff.

George A. Thornton, Groshong, Lehet & Thornton, Seattle, WA, for defendant.

ORDER DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT

HOVIS, United States Magistrate Judge.

*1 BEFORE THE COURT is the defendant's motion for partial summary judgment (Ct.Rec. 23) and the plaintiff's motion for partial summary judgment (Ct.Rec. 36). This is an action brought by plaintiff pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. s 51 et seq., for recovery of damages due to an alleged violation by defendant of the Federal Safety Appliance Act (FSAA), 45 U.S.C. s 2, and/or due to the defendant's alleged negligence. Both parties seek summary judgment on the issue of defendant's liability under the Federal Safety Appliance Act.

UNCONTROVERTED FACTS

Based on the respective statements of facts submitted by the parties, the court considers the following facts as uncontroverted for the purpose of the pending motions:

1. Plaintiff is a 34-year-old switchman/brakeman who has worked for Burlington Northern Railroad (BN) in the Spokane area since 1979.

2. On November 5, 1992, plaintiff was working as a switchman for Burlington Northern on Track 13 in Spokane, Washington. He was part of a switching crew gathering piggyback cars for a train makeup on Track 13.

3. At approximately 4:00 p.m., plaintiff was directing the train movement to couple together a set of railroad cars. Cars are coupled together by a knuckle, which is a moveable device attached to a drawbar located at each end of the railroad car.

4. The initial attempt to couple the rail cars failed. As plaintiff directed the cars to be coupled, he noticed that the knuckles of the cars did not line up. According to plaintiff, the collision "shot the drawbars out of alignment." This happens on occasion and the employee must manually move the drawbar so that it aligns with the other knuckle. Plaintiff gave the orders to pull the cars apart.

5. Plaintiff then attempted to align the drawbar. Aligning the drawbar required plaintiff to lift it slightly and slide it sideways. While sliding the drawbar, plaintiff felt a "pop" in his back. Plaintiff completed the maneuver, aligned the drawbar and coupled the cars.

6. Plaintiff did not notice any defect in the drawbar itself nor did he order the car out of service for any defect.

7. Plaintiff completed his shift without experiencing any pain. He did not report his alleged injury until the following day. Plaintiff did not note any equipment defects on the "Personal Injury Report" he submitted to defendant.

8. Plaintiff missed three months of work because of his alleged injury.

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states that a party is entitled to summary judgment in his favor, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." Rule 56(e) further provides: When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

*2 As the Supreme Court stated in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id.

Rule 56 does not require the moving party to negate the elements of the nonmoving party's case; to the contrary, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments

embrace the "specific facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." The object of this provision is not to replace the conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. The purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues. Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990) (citations omitted).

DISCUSSION

45 U.S.C. s 2 provides: On or after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such railroad [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The failure of coupling equipment to perform as required by the statute (45 U.S.C. s 2) is "in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability--a liability that cannot be escaped by proof of care or diligence." O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 390 (1949). A violation of 45 U.S.C. s 2 constitutes a wrongful act under the FELA (45 U.S.C. s 51 et seq.) and is a basis upon which a railroad can be held liable for damages. Crane v. Cedar Rapids & I.C.R. Co., 395 U.S. 164, 166 (1969).

A. Defendant's Contention and Supporting Case Law

*3 Defendant contends that there is no evidence that plaintiff's injury occurred as a result of defective coupling equipment. Defendant contends that the knuckles failed to

couple simply because of a misalignment of the drawbars. As such, defendant asserts there is no statutory violation. In support of its assertion, defendant cites the following cases.

In Goedel v. Norfolk & Western Railway, 13 F.3d 807 (4th Cir.1994), the plaintiff, a brakemn, was involved in transporting three railroad cars to another track to couple with thirteen stationary cars. As the moving cars approached the stationary cars, plaintiff noticed that the coupling mechanisms on the two stationary cars were not aligned. Plaintiff attempted to align the coupling mechanisms by kicking the misaligned coupler on the stationary car. His foot became caught and was crushed between the two coupling mechanisms. Id. at 809.

Plaintiff brought an action alleging a violation of the Federal Safety Appliance Act. According to plaintiff, because the coupling mechanism on the stationary car was "frozen" in a position that was out of line with the coupler in front of it, the two cars would not have automatically coupled and this required him to move between the two cars in order to align the coupling mechanisms. Id. at 810. There was no evidence at trial indicating that the knuckle on the stationary car's coupling mechanism was defective. Plaintiff testified that the knuckle on the moving car was open and that the cars would have coupled had the knuckles been aligned properly. Id. at 811.

The court noted that the evidence did not support plaintiff's assertion that the drawbar on the stationary car was "frozen." Instead, the evidence revealed that the stationary car was later coupled to another car, thereby demonstrating that the drawbar was not "absolutely frozen." The circuit court agreed with the trial court's determination that the coupling mechanism on the stationary car (the drawbar and the knuckle together), was not defective. Therefore, there was no violation of the FSAA because there was no proof of defective equipment. Id. at 811-12.

The Fourth Circuit went on to state that it did not consider a simple misalignment of couplers, in the absence of a defect in the equipment, to be a violation of the FSAA. According to the court, although the Act requires that all coupling mechanisms perform automatically, this requirement means that the coupling knuckles must couple automatically once they are in proper position. The court observed that even with perfectly functioning knuckles, workmen must occasionally move between the cars to cure problems of misalignment and this should be done while the cars are stationary. Secondly, the court observed that the coupling mechanisms are designed to move laterally so that a train can negotiate turns without derailing. Lateral play allows rail cars to be coupled when the cars are located on a curved track. The drawbars typically need four to six inches of lateral play and it is therefore inevitable that the coupler mechanisms will occasionally be misaligned. According to the court, if recovery were allowed under the FSAA for a simple misalignment of coupling mechanisms, in the absence of a defect in the equipment, the court would be ignoring the "practical requirement that drawbars move laterally so that trains may move smoothly without derailing." Id. at 812.

*4 The Fourth Circuit's decision in Goedel followed reasoning from cases decided in the Third Circuit and the District of Columbia Circuit. In Reed v. Philadelphia, Bethlehem & New England Railroad Company, 939 F.2d 128 (3rd Cir.1991) cert. denied, --- U.S. ----, 113 S.Ct. 1584 (1993), the plaintiff, a freight conductor, and his crew were assigned the task of weighing train cars. To accomplish this, the workers were to uncouple each car and allow it to pass across an automatic scale on the tracks. The cars were then to reconnect at a point beyond the scale. The plaintiff uncoupled a boxcar from the rest of the train, climbed aboard, and ~~rode it~~ down beyond the scale. The crew uncoupled the next car, a scrapcar, which passed over the

scale and contacted the boxcar but failed to couple with it on impact. Plaintiff went between the two cars and found the knuckles on both couplers were closed. He first opened the knuckle on the boxcar, using a lever located on the outer edge of the car. He attempted to do the same on the scrapcar, but testified that the lever did not function. He then stepped between the two cars to open the knuckle. While he was doing this, the scrapcar lurched forward and amputated part of his foot. Id. at 129.

The Third Circuit provided a detailed description of a train car's coupling mechanism. It noted that drawbars are aligned manually, but that they sometimes move out of position because of the vibration and movement of the railroad car. According to the court, even if a crewman corrects the alignment before a car begins its movement toward where the coupling is to occur, it is possible that the car's motion may jar the drawbar out of position. Furthermore, aligning the drawbars requires the crewman to go between the cars. The court stated that it had not been made aware of any device which had been put into widespread use and which would automatically align the drawbar. Id. at 130.

The Third Circuit discussed the Supreme Court's decision in Affolder v. New York, C & S.L. R.R. Co., 339 U.S. 96 (1950). The court stated that it thought Affolder stood for the proposition that if the jaws of both the knuckles on separate train cars are closed at the time of impact, then a railroad may offer evidence to explain the mishap and the failure to couple does not, in and of itself, establish a per se violation of the FSAA. However, the Affolder case did not deal with another frequent cause of failed coupling--misalignment of the drawbar. The circuit concluded that the Supreme Court had not definitively resolved the drawbar misalignment issue. Id. at 131.

The Third Circuit concluded that the Affolder rationale allowing a defense of closed knuckles should apply equally to a situation where non-defective equipment is misaligned. According to the court: In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act. *5 Id. at 132.

Mere failure to couple does not establish a per se violation of the FSAA; however, it is the defendant's burden to show that the misalignment occurred not because of equipment failure. The defendant must show a separate cause for failure to couple, other than equipment failure. Id.

In Maldonado v. Missouri Pacific Railway Company, 798 F.2d 764 (5th Cir.1986), cert. denied, 480 U.S. 932 (1987), the plaintiff, a switchman, was involved in switching operations which involved the engine setting a rail car in motion toward a stationary car. Among the rail cars set in motion by the engine was a certain TTX car. Before the TTX car was sent in motion down the track, the plaintiff opened the knuckle on the car's coupler and observed that its drawbar was properly aligned. After the TTX car was sent down the track, plaintiff heard it strike the stationary car. The engine then coupled with the TTX car and pulled forward. At this point, plaintiff noticed that the TTX car had failed to couple with the car behind it. Plaintiff aligned the drawbar on the second car and then attempted to align the TTX drawbar but was unable to do so. Plaintiff injured his back while attempting to align the drawbar. Id. at 766.

The Fifth Circuit concluded that the FSAA is essentially an equipment safety statute and as such, drawbar misalignment prior to impact may not support a defense unless the misalignment is due to some factor other than

equipment failure or defect. It is the railroad's burden to produce evidence showing that the misalignment was not due to equipment failure or defect. A drawbar with more lateral play than is appropriate for normal operation "clearly amounts to a violation of the FSAA." Id. at 768.

In Maldonado, there was no evidence suggesting a cause or explanation for misalignment of the drawbar, or even that the drawbar was misaligned. Because there was no such evidence, the circuit concluded that the trial court did not err in failing to provide the jury with an instruction on a defense of drawbar misalignment. Id. at 768-69. In a footnote, the court speculated about the possibility of the defendant railroad asserting impact from an attempted coupling as a non-equipment cause of post-impact misalignment. However, the court stated that the defendant railroad could not rely on the impact of the attempted coupling because there was no evidence concerning the cause of the "proposed" misalignment that prevented coupling and thus led to impact. Id., n. 4.

United Transportation Union v. Lewis, 711 F.2d 233 (D.C.Cir.1983), involved an appeal of decisions of the Secretary of Transportation and the Federal Railroad Administrator. Those decisions found that use of metal hooks to open coupler knuckles during railroad humping operations did not violate Section 2 of the Safety Appliance Act and that no basis existed for issuing an emergency order prohibiting such use. Id. at 234-35. The union argued on appeal that Section 2 was violated because use of the metal hooks required an employee to go between the cars or to place a material portion of his body between the cars. Id. at 242.

*6 The D.C. Circuit found that Section 2 does not impose an independent prohibition against the act of going between the ends of cars during uncoupling operations. After an extensive review of the plain language of the statute, its

legislative history, and applicable case law, the court concluded that Section 2 only prescribes mandatory safety equipment. Therefore, the mere operation of a metal hook is not a per se violation of the Safety Appliance Act. Rather, "[T]he predicate for liability under Section 2 is the failure to provide equipment that functions as the statute commands." Id. at 251.

B. Plaintiff's Contention and Supporting Case Law

The plaintiff takes issue with defendant's assertion that 45 U.S.C. s 2 is only an equipment safety statute. Plaintiff contends that the only issue which needs to be considered is whether the cars coupled automatically without the necessity of employees going between the cars. If the cars do not couple automatically and an individual must go between the cars in order to effectuate the coupling, a violation of 45 U.S.C. s 2 occurs and the railroad is liable to the individual for injuries suffered by him in effectuating the coupling.

Plaintiff asserts that the Sixth Circuit's reasoning in Clark v. Kentucky and Indiana Terminal Railroad, 728 F.2d 307 (6th Cir.1984), is consistent with Supreme Court authority and more persuasive than any of the cases relied upon by the defendant. In Clark, the plaintiff, a switchman helper, along with an engineer, proceeded to a spur track to remove a cut of five to six cars. The engineer backed the engine into the spur track and coupled with the lead car. As the engine pulled away, the plaintiff noticed that the last car in the cut had been left behind and he signaled for a stop. Plaintiff discovered that the trailing coupler on the second to the last car in the cut had a closed knuckle and was skewed six to eight inches off center. Plaintiff pulled the pin holding the knuckle closed, stepped between the cars and attempted to center the coupler. Plaintiff's attempt met with resistance and so he braced himself against the track, straining to force the coupler into place. Plaintiff felt a numbing pain in his

side which was later diagnosed as a hernia. Plaintiff finished centering the coupler, stepped out from between the cars and signaled the engineer to back up. This time, the last car was successfully coupled to the remainder of the cut. Id. at 309.

A jury found the defendant railroad in violation of Section 2 of the FSAA and awarded damages to the plaintiff. However, the court entered a judgment notwithstanding the verdict for the defendant railroad. The court concluded that plaintiff had failed to meet a threshold burden of showing that the couplers did not couple on impact. Plaintiff appealed. Id. at 309-10.

The circuit court concluded that from the evidence, a jury could have reasonably inferred that an impact was intended and occurred between any uncoupled cars in the cut on the first backing but that the couplers failed to perform automatically between the last two cars. The failure of the couplers resulted in plaintiff returning to the uncoupled cars, finding a misaligned coupler with a closed knuckle, and stepping between the cars where he was injured. Id. at 310.

*7 The circuit court further held that the absence of direct evidence of the position of the couplers prior to impact did not prevent the jury from finding a violation of Section 2. The court noted that in one of its previous decisions, Cobb v. Union Railway Company, 318 F.2d 33, 37 (6th Cir.1963), it had stated that a jury could not find a violation of the FSAA if the couplers failed to automatically couple if they were not properly set. However, the jury could infer from that fact, but they were not required to infer, that the failure was under circumstances constituting a violation of the FSAA. Id. at 311.

The court concluded that there was sufficient evidence for the jury to properly infer that the failure of the couplers to couple automatically upon impact was under circumstances constituting a statutory violation. This evidence consisted of testimony that it was the practice of carmen to walk the

railyard visibly inspecting the condition of the cars, and that when a misaligned coupler was observed it was customary to put it in a position to couple. On the basis of this evidence, a jury could infer that the couplers were more likely than not to have been properly aligned. Furthermore, there was evidence suggesting that the failure of the couplers to couple on their first impact, or to remain coupled, may have been due to factors other than the position of the couplers (i.e. the railroad's inspection revealed that the second to last car in the cut had a defective knuckle which would not lock properly; and the coupler was old and worn). From this, the jury could infer that the coupler failed to lock on the first backing, even though properly set. Id.

The railroad argued that the fact that plaintiff found the knuckle closed and the coupler misaligned on the second to the last car in the cut compelled an inference that the couplers were not properly set before the first impact. The court rejected that argument, declaring that the closed knuckle revealed little about the position of the knuckle before impact and nothing about the position of the knuckle on the last car in the cut. In addition, the fact that the coupler was misaligned after impact did not require an inference that the coupler was not aligned before impact. Id. at 311-12.

The court also rejected the railroad's argument that the Affolder case stands for the proposition that a misaligned coupler is not a sufficient basis for liability under Section 2. According to the court, Affolder merely held that a failure to couple due to two closed couplers was not a violation of Section 2. "[I]mportant distinctions between closed and misaligned couplers argue against the application of Affolder to the latter condition." The court noted that a coupler typically has a lateral play of one to one-and-one- half inches on either side that permits movement of coupled cars around curves. The lateral motion may be increased by wear. If the

couplers are out of alignment beyond the normal play, the coupling will not occur automatically even though both knuckles are open. On the other hand, a coupler knuckle is by design either open or closed and its position is not attributable to aging equipment. In addition, should both couplers be found in the closed position before an attempted coupling, a worker can open a knuckle by operation of a lift lever on the side of the railroad car. In order to correct a coupler that is so out of alignment as to make it impossible to successfully couple the cars, it is necessary that the railroad employee step between the cars to make the adjustment. One of the purposes of Section 2 is to require automatic coupling and uncoupling without the necessity of men going between the cars. Id. at 312-313.

***8** Among the cases cited in the Clark decision is Metcalfe v. Atchison, Topeka and Santa Fe Railway Co., 491 F.2d 892 (10th Cir.1974). Metcalfe involved a railroad employee who was killed when he went between two railroad cars during switching operations. Plaintiff was crushed by one of the cars. During the time efforts were being taken to remove plaintiff's body, it was noticed that the drawbar on one of the cars (a "piggyback" car) was slanted toward the east to such an extent that it was necessary to realign it in order to make the coupling. This necessitated going between the cars. Id. at 894-95.

The Tenth Circuit found there was evidence from which a jury was entitled to infer that the piggyback car would not have successfully automatically coupled with any car without realignment of the drawbar. The evidence showed that the drawbar on the piggyback car was out of line to the "extreme east." A jury could reasonably conclude that a drawbar misaligned to the "extreme east" would not couple on impact, particularly in view of the railroad's practice of keeping drawbars centrally aligned at all times, and of coupling on a straight track as opposed to a curved track

whenever feasible. Therefore, there were probative facts to support the jury's finding that Section 2 had been violated. Id. at 897.

Plaintiff also relies on Shuff v. Consolidated Rail Corporation, 818 F.Supp. 219 (N.D.Ill.1993). In that case, Mr. Shuff was injured while manually adjusting the coupling mechanism on a railroad car. The mechanism had initially failed to couple automatically on impact. Shuff proceeded to manually center the drawbars on two cars and open the knuckle on one car in order to facilitate coupling. He experienced pain in his lower back while attempting to manually center the drawbar. Id. at 220.

The court in Shuff reviewed the Clark, Reed, and Maldonado decisions. The court noted that both the Reed and Maldonado decisions relied on a statutory interpretation of Section 2 contained in the Lewis decision. The court found the Reed and Maldonado interpretations of Lewis unpersuasive. According to the court, Lewis recognizes that FSAA requires more from the railroads than just safety equipment. In Lewis, the court stated that an "actual failure to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under Section 2, because Congress imposed a duty on railroads not just to provide proper equipment, but also to guarantee its performance." Id. at 224 citing Lewis, 711 F.2d at 251, n. 39.

C. This Court's View

The Ninth Circuit has not offered any guidance on what it considers to be a proper interpretation of 45 U.S.C. s 2. Therefore, the court must rely on the authority cited above.

Based on the reasoning contained in the Lewis case and its excellent analysis of the language and legislative history of Section 2, the court is persuaded that Section 2 is an equipment safety statute. The mere fact that an individual

is injured when he goes between railroad cars is not a violation of Section 2 unless the injury is the result, in whole or part, of improperly functioning equipment. A railroad is not liable unless it fails to provide functioning equipment. With that in mind, the question then becomes whether a misaligned drawbar is always, in itself improperly functioning equipment, or the result of improperly functioning equipment.

*9 The Clark case does not stand for the proposition that misaligned couplers, in all circumstances, are to be considered as defective equipment or the result of defective equipment. In Clark, the court specifically noted that a jury is not required to find an FSAA violation if there is evidence that the couplers were not properly set prior to impact. In Clark, the jury had sufficient evidence to find that the couplers were properly aligned prior to impact, thus suggesting that there was an equipment defect. The jury's finding was borne out by evidence that a knuckle on one of the cars was defective and that the coupler was old and worn. Furthermore, the Clark court refused to find that a misaligned coupler is not a sufficient basis for Section 2 liability because, although there is some normal lateral play in a coupler, the lateral motion may be increased by "wear" and the couplers may become misaligned beyond "normal play." In those instances, the coupler has clearly become a defective piece of equipment.

Metcalfe also recognizes that Section 2 is an equipment safety statute. The court there noted that the coupling apparatus permits limited movement of the drawbar from side to side in order to allow the cars, when coupled together, to pass around the curves without derailment and to allow coupling on the curve. In some cases, the drawbar may move so far off-center as to preclude automatic coupling. 491 F.2d at 896. In Metcalfe, the drawbar was out of line to the "extreme east." The court found the situation similar to that in Hampton v. Des Moines and Central I.R.R.,

65 F.2d 899 (8th Cir.1933) where testimony that a drawbar was four or five inches out of line and would not couple on impact "constituted substantial evidence that the coupler was defective." Id. at 897 quoting Hampton at 901. (Emphasis added).

This court does not agree with the categorical statement in Shuff that misalignment before coupling is not a defense to Section 2 of the FSAA. Misalignment can be a defense if the defendant offers sufficient evidence that the misalignment is not the result of defective equipment. Shuff's reliance on Lewis is not persuasive. Lewis states only that an actual failure to couple because of a misaligned drawbar is "sufficient" to establish liability. Lewis does not state that under all circumstances a misaligned drawbar establishes a Section 2 violation.

The Reed decision cites Atlantic City R.R. Co. v. Parker, 242 U.S. 56 (1916). In that case, anengine and a rail car failed to couple automatically upon impact. The plaintiff noticed the "drawhead" on the rail car was not in line with the one on the engine. He inserted his arm between the cars for the purpose of straightening the drawhead and was injured in the process. Id. at 59.

In an opinion authored by Justice Oliver Wendell Holmes, the Supreme Court stated: Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. ***10** Id. (citations omitted). (Emphasis added). This

early Supreme Court decision involving Section 2 further convinces the court that a railroad is not flatly prohibited from tendering a defense of misaligned drawbars where there has been a failure of rail cars to automatically couple. See also San Antonio Ry. v. Wagner, 241 U.S. 476, 483-84 (1915) (Jury could reasonably find that misalignment of drawbars was greater than required to permit the rounding of curves). This court finds nothing in O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384 (1949), Carter v. Atlanta & St. Andrews Bay Railway Co., 338 U.S. 430 (1949), or in Affolder v. New York, Chicago & St. Louis Railroad Co., 339 U.S. 96 (1950) suggesting that the reasoning in Atlantic City was misguided.

As all of the case law makes clear, however, it is the railroad's duty to show that the misaligned drawbars are the result of something other than defective equipment. [FN1] In the instant case, the evidence relied on by both parties in support of their motions consists of plaintiff's deposition testimony. Accordingly, a review of that testimony is necessary to determine whether there is an issue of genuine material fact as to whether the failure of the cars to couple was due to defective coupling equipment.

Plaintiff was asked to describe what happened as he was giving hand signals to the engineer to continue the reverse movement to pick up the piggyback cars. According to plaintiff, "[T]he knuckles didn't line up." Plaintiff testified that when the engineer attempted to couple with the cars, "[H]e came against the cut of cars and [sic] enough slack that the drawbars did not align. They were that close that they didn't and it shot the drawbars out of alignment" with the west car drawbar going "north" and the east car drawbar going "south." At that point, plaintiff instructed the engine to move forward. The engine moved forward fifty feet and came to a stop. Once the engine and the cars coupled to it became stationary and the remaining cars on the track

became stationary, plaintiff moved between the cars to realign the drawbar. (Towles Depo., pp. 54-56, Ex. to Ct.Rec. 27).

Plaintiff indicated that in order to realign the drawbar he first had to lift it about a "quarter inch, half inch" and then slide it "approximately several feet." As he was sliding the drawbar, he felt the "pop" in his back. After the drawbar was realigned, plaintiff and his crew were able to successfully couple the cars. (Towles Depo., pp. 61-63).

Counsel asked plaintiff: Q: And in terms of before you started to do the--to realign the drawbars, Mr. Towles, did you see why the cars didn't decouple (sic) when the engineer first went into the reverse mode. [FN2] A: The drawbars were slightly out of alignment to start with, due to prior switching, I imagine. I couldn't be sure of that, but-- Q: Were you able to draw any conclusions before you started to manually realign the drawbars as to whether there was anything wrong with the drawbars themselves? ***11** A: Not at that point, no. Q: Were you able to draw any conclusions or was there any kind of problem with the coupler mechanism on either one of the two cars? A: I wasn't aware of any at the time. (Towles Depo., pp. 56-57).

Plaintiff was asked whether he thought the curvature of the track (Track 13) on which the cars were located had anything to do with the failed coupling. Plaintiff responded the he would "only be speculating." However, he added that he had had such an experience on other tracks, "not necessarily 13." Plaintiff was asked whether in other experiences with track having similar curvature to Track 13 he had stopped the "movement" prior to coupling in order to confirm that the drawbars were properly aligned. Plaintiff indicated that he had done so on prior occasions, however he did not do so on this occasion because the cars that were to be coupled were already too close together. [FN3] (Towles Depo., pp. 59-60). Plaintiff stated he did not believe there

was anything wrong with the knuckles of either of the cars to be coupled or that there was anything wrong with the drawbars in themselves. (Towles Depo., p. 69).

Although plaintiff noticed that the drawbars were out of alignment prior to the attempted coupling [FN4], there is no evidence as to extent of the misalignment. Plaintiff's testimony suggests that the impact of the attempted coupling threw the drawbars even further out of alignment. It appears there is some curvature to Track 13; however, the record provides no indication as to the extent of the curvature and how that might have affected the alignment of the drawbars. Plaintiff indicated he thought the misalignment may have been due to some prior switching.

Based on the record, the court cannot state as a matter of law that the "lateral play" in the drawbars prior to the attempted coupling was so great or abnormal as to constitute a Section 2 violation. In other words, there is an issue of genuine material fact whether the alignment of the drawbars prior to the attempted coupling constituted an equipment defect and if so, whether that defect precluded coupling. The trier of fact should make that determination based on the reasonable inferences which it can draw from the evidence presented at trial. [FN5]

IT IS HEREBY ORDERED that the defendant's motion for partial summary judgment (Ct.Rec. 23) and the plaintiff's motion for partial summary judgment (Ct.Rec. 36) are DENIED.

FN1. Obviously, the railroad's burden arises only once the plaintiff has sustained his burden of proving that the coupling mechanisms on the rail cars were in fact not aligned. For the purpose of the pending motions, the railroad has not disputed plaintiff's assertion that the coupling mechanisms were not aligned prior to the attempted coupling.

FN2. The court has to believe that counsel intended to state the word "couple" rather than "decouple." In a prior question, counsel asked plaintiff whether "when the engineer was first in the reverse mode to couple the cars, did he actually attempt to couple the cars...." (Lines 23-25 at p. 54).

FN3. Plaintiff's response suggests that he would agree that Track 13 is a curved track.

FN4. This record shows that there was an attempted coupling and an impact from that attempt. Even in the absence of an attempted coupling, this court believes that an FSAA violation is possible so long as the evidence shows that there is an equipment defect with the coupling mechanism such as would preclude coupling. See Clark, 728 F.2d at 312 (citations omitted) and Southern Railway Co. v. Cagle, 229 F.2d 12, 14 (10th Cir.1955). Goedel v. Norfolk & Western Railway does not hold that an attempted coupling is a prerequisite to FSAA liability.

FN5. Even if the evidence establishes an equipment defect, plaintiff will still need to prove that the defect was the cause, in whole or part, of the injuries allegedly sustained by him.